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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 635

BEN WILLIAMSON, JR., Trustee of INLAND GAS CORPORATION,

Petitioner,

v.

COLUMBIA GAS & ELECTRIC CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinions Below

The opinion of the Court of Appeals for the Third Circuit (R. 213-222) is reported at 186 F. 2d 464. The opinion of the District Court is reported at 91 F. Supp. 874 (R. 125a).

Statement

The decision which Petitioner seeks to review affirmed (unanimously) a judgment (R. 135a) of the District Court which dismissed, on Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56, a Complaint seeking treble damages under 38 Stat. 731, 15 U. S. C. A. § 15.

The judgment was based on *res judicata*: that Petitioner's action was barred by the order of the same District Court entered April 29, 1939 (R. 119a) which dismissed a treble damage suit by the same plaintiff (Petitioner here) against

the same defendant (Respondent) under the Delaware three-year statute of limitations (Del. Rev. Code 1935 § 5129; 27 F. Supp. 198); which order the Court of Appeals had unanimously affirmed, 110 F. 2d 15 (Dec. 21, 1939) cert. den. 310 U. S. 639 (May 27, 1940).

The Complaint Dismissed Below and the Complaint Dismissed in 1939

Much of the "Statement" in the Petition is confusingly irrelevant to Petitioner's "Questions Presented". The basic decision made by both courts below was that the Complaint herein stated the same cause of action as the Complaint dismissed in 1939 and, therefore, the instant action was conclusively barred. Both courts so decided after careful analyses of the two lengthy and verbose Complaints, having before them the printed consolidation (R. 137-204) which shows typographically, by the use of underlining and brackets, every word in which the Complaints differed from each other. The Court of Appeals said (R. 217):

> "The information set forth in the two complaints is substantially identical, plaintiff merely using words of conspiracy in the first action and replacing them with allegations that defendant did the same things on its own or through its agents in the second action. The wrongful acts alleged on the part of the defendant and the damages alleged to have been sustained by the plaintiff are practically identical in both suits. Indeed, the identity of the damage claims is almost startling, for except for a few figures with regard to interest the allegations of the particular items of damage are alike to the penny."

The purported distinction by which Petitioner has attempted to avoid the application of *res judicata* is this:

Although both Complaints sought treble damages for the same alleged injuries caused by the same alleged acts they alleged that these same acts were forbidden by different sections of the anti-trust laws—by Clayton Act § 7, 15 U. S. C. A. § 18 (in the Complaint dismissed in 1939) and by Sherman Act §§ 1 and 2, 15 U. S. C. A. §§ 1 and 2 (in the Complaint herein)—this attempted distinction being carried through by substitution of words at appropriate points so that, wherever one Complaint used the word "conspiracy" the other substituted reference to Respondent's "determination to lessen competition" or "design to continue the monopoly" or some such substitute phrase.

But when this has been stated, the distinction ends. The lengthy narratives are practically identical. Both Complaints asserted (Par. 4 of both; R. 144) that this was an action brought under 38 Stat. 731, 15 U. S. C. A. § 15, commonly known as § 4 of the Clayton Act for injuries to business and property by reason of acts forbidden in the anti-trust laws. Both Complaints then alleged exactly the same injuries to the same business and property by reason of the same alleged acts of Respondent; both set forth at length an alleged monopoly of the natural gas business by Respondent in certain States, the incorporation and financing of Petitioner's corporation, Inland Gas Corporation, to undertake operations within the alleged monopolized territory, the acquisition of control of Inland by a Syndicate which had a "project" to construct a pipeline from Eastern Kentucky to Detroit across the alleged monopolized territory. Both Complaints alleged the same acts of Respondent to protect its alleged monopoly, viz., acquisition of stock control of Inland, discontinuance of the projected Detroit line, institution of a receivership of Inland and domination

by Respondent of the receiver, and both alleged that, had it not been for these wrongful acts, Inland, which had theretofore always operated at a loss, would have turned into a profitable operating company.

In conclusion both Complaints enumerated the identical items of damages in identical principal amounts, for which threefold damages were sought.

Petitioner's "Statement" never performs the task of comparing the two Complaints. The so-called "Comparison" in his Brief (pp. 28-36) is quite misleading because, although it gives a number of excerpts from the Complaint herein purportedly describing the "continuing conspiracy", it fails to say that everything there alleged as constituting the continuing conspiracy and resulting injuries was likewise alleged (in most cases verbatim) in the Complaint dismissed by the prior adjudication, as constituting acts violating Clayton Act § 7 and injuries resulting therefrom. Even the words which Petitioner italicizes, at the bottom of page 31 of his Brief occurred verbatim in the Complaint dismissed in 1939, except that for "conspiracy" there were substituted the words "acts of Columbia" (R. 167-168).

Petitioner's Reason for Instituting the Action Which Was Dismissed in 1939

Petitioner devotes several pages of his "Statement" (Petition, pp. 6-9) to his views as to the nature of the judgment in 1939 which constitutes the prior adjudication, which he regards as a "limited judgment" because the parties had stipulated that the alleged right of action sued upon accrued not later than January 1, 1931.

The action whose dismissal constitutes *res judicata* herein was begun in September, 1938, seven months after

institution of the instant action in February 1938.* Petitioner's reason for instituting a new suit in September, so largely a carbon copy of one begun in February, was to bring it under the new Federal Rules of Civil Procedure, which had become effective the very day the new Complaint was filed, September 16, 1938. Petitioner believed (quite erroneously) that the new Rules would eliminate the Delaware statute of limitations in the federal courts (affidavit of Arthur G. Logan, R. 120a) and thus avoid the obvious bar of the three-year statute to suits begun in 1938 complaining of acts in 1930.

On this erroneous theory Petitioner carried his earlier litigation through the courts, to denial of certiorari. Nothing supports Petitioner's statement that the purpose of the stipulation was to present to the courts a hypothetical question as to "what, if any, statute of limitations would bar a civil action" (as he now alleges, Petition, p. 6) or that the courts so regarded it or that the prior judgment was merely a "limited judgment" (Petition, p. 9). Petitioner's own statement at that time, made to this Court as well as the courts below (see Williamson's petition for writ of certiorari, October Term, 1939, No. 935 and supporting brief, pp. 4, 15) was: "We *admit* that the instant Civil Action was brought more than three years after the accruing of the cause of such action". (Emphasis supplied) The opinions below showed clearly that the courts considered not only the stipulation of the parties but the detailed allegations of the Complaint, *Williamson* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 198, aff'd 110 F. 2d 15.

*Since the acts and injuries complained of occurred in 1930, the instant action was as much barred by the Delaware three-year statute as the action dismissed in 1939. In the instant action, as the District Court granted the motion for summary judgment on its first ground, *res judicata*, it found it unnecessary to consider the second, which was the statute of limitations, and the Court of Appeals similarly based its affirmance on *res judicata*, although both grounds were briefed.

Questions Presented

Petitioner states that the questions presented are as follows (Petition, p. 10; Brief, p. 14):

> "1. Can a Dismissal of a Complaint Seeking Threefold Damages in a Cause of Action Given Under Section 7 of the Clayton Act Bar, as *Res Judicata,* an Action for Threefold Damages in a Cause of Action Given Under Section 1 or Section 2 of the Sherman Act?
>
> "2. Shouldn't the Rule, Adopted in *Holmberg* v. *Armbrecht,* 327 U. S. 392, 90 L. Ed. 743, that State Statutes of Limitations Cannot be Availed of to Bar Enforcement of Suits in Equity in a Federal Court on a Federally-Created Right Be Enlarged to Apply on the Law Side as Well, and, if so, Should not Petitioner Be Relieved from the Effects of the Prior Adjudication?"

The answers which the Court of Appeals gave to these questions, and the principles which underlie them, are thoroughly established by many decisions, present no conflict with decisions of this Court and nothing of novelty or public interest. We will treat them briefly in turn.

ARGUMENT

I

THE DECISION BELOW APPLIED THE DOCTRINE OF RES JUDICATA PURSUANT TO PRINCIPLES WELL ESTABLISHED BY THIS COURT.

Both courts below held that it was immaterial that the Complaint dismissed by the prior adjudication alleged that Respondent's acts violated Clayton Act § 7 whereas the

Complaint in the instant case alleged that the same acts violated Sherman Act §§ 1 and 2, the causes of action being otherwise the same.

This was clearly correct. It has long been well established that a cause of action consists of the acts invading plaintiff's right and not of the grounds of their illegality, and therefore all *"media concludendi"* will be bound by the judgment. Since the grounds of alleged illegality are not themselves the cause of action, a plaintiff is required to set forth at one time all of the grounds upon which he rests his claim. Authority and statements to this effect are very numerous, *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316; *Grubb* v. *Public Utilities Comm.,* 281 U. S. 470, 478-9; *United States* v. *California & Ore. Land Co.,* 192 U. S. 355, 358; *Werlein* v. *New Orleans,* 177 U. S. 390; *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430; See Freeman, Judgments (5th Ed.) §§ 681, 682; Restatement of the Law, Judgments, § 63 (1942). Likewise, nothing is better established than that in a civil treble damage suit the conspiracy is not the cause of action, *Keogh* v. *C. & N. W. Ry. Co.,* 260 U. S. 156; *American Sea Green Slate Co.* v. *O'Halloran,* 229 Fed. 77 (C.C.A. 2d); *Sidney Morris & Co.* v. *National Ass'n of Stationers, etc.,* 40 F. 2d 620 (C. C. A. 7th); *H. J. Jaeger Research Laboratories* v. *Radio Corporation,* 90 F. 2d 826 (C.C.A. 3d); *Turner Glass Corporation* v. *Hartford-Empire Co.,* 173 F. 2d 49 (C.C.A. 7th), cert. den. 338 U. S. 830; *Momand* v. *Universal Film Exchanges,* 172 F. 2d 37 (C.C.A. 1st, unanimous, cert. den. 336 U. S. 967).

These well known principles have been applied, for purposes of *res judicata,* to successive treble damage suits under the anti-trust laws. *F. L. Mendez & Co.* v. *General Motors Corporation,* 161 F. 2d 695 (C.C.A. 7th) cert. den.

332 U. S. 810 is directly in point. The substance of this decision is stated in the first headnote as follows:

> "Successive actions by automobile dealer against manufacturer based upon same wrongful cancellation of dealer's franchise, involved same causes of action though the first action was brought under Sherman Anti-Trust Act and the second action under Clayton Act, and hence judgment for defendant in first action was res judicata in second action."

Petitioner's attempts to avoid these basic principles of *res judicata* involve *first* a misapprehension of the statutes and *second* a complete misunderstanding of the authorities.

(1) Throughout his brief, Petitioner attempts to differentiate between the causes of action in his two Complaints by calling one a treble damage cause of action "given" by Clayton Act § 7 (38 Stat. 731, 15 U. S. C. A. § 18) and the other a treble damage cause of action "given" by Sherman Act § § 1 and 2 (26 Stat. 209 as amended by 50 Stat. 693, 15 U. S. C. A. § § 1 and 2).

These sections do not "give" *civil* rights of action at all; they state offenses against the United States—things which are "forbidden". Clayton Act § 4 (38 Stat. 731, 15 U. S. C. A. § 15) provides that any person "injured" in his business or property by "anything forbidden in the anti-trust laws" may sue and recover threefold damages. This section and this alone "gives" the *civil* treble damage action.

The fact that a single section (Clayton Act § 4) now gives the civil right of action for injuries caused by anything forbidden by either the Sherman Act or the Clayton Act emphasizes (exactly the opposite of what plaintiff argues, pp. 23-28 of his Brief) that it is the *injury* which gives rise to the civil cause of action.

(2) Petitioner's misapprehension of the cases (his Brief, pp. 15-22) is just as complete as his misunderstanding of the statutes. Not one of his cases holds (as he categorically asserts they do) that the dismissal of a treble damage cause of action "given" under Clayton Act § 7 cannot bar, as *res judicata,* a treble damage cause of action "given" under Sherman Act § § 1 and 2.

United Shoe Machinery Co. v. *United States,* 258 U. S. 451 (1921), on which Petitioner chiefly relies, was not a treble damage case at all. The *prior* adjudication involved had been the decree, adverse to the Government, in a suit seeking to dissolve the Shoe Machinery Corporation as a combination and monopoly forbidden by the Sherman Act. The subsequent case was a Government suit to enjoin the corporation from the use of restrictions in leases of machinery as violating Clayton Act § 3. Plainly a Government suit to enjoin restrictive lease provisions does not assert the same cause of action as a Government suit to dissolve a corporation as a monopoly. The *res judicata* question which was argued was not based upon any supposed identity of the causes of action. It was: that the Government was estopped to attack the restrictive leases under Clayton Act § 3 because the same restrictive leases had been attacked in the prior suit as violating the Sherman Act, and had been upheld because valid under the patent law. Since Clayton Act § 3 expressly prohibits restrictive leases as to *patented* as well as unpatented machines, the Court held that the Government was not estopped.

Buckeye Powder Co. v. *Du Pont Co.,* 223 Fed. 881 (C. C. A. 3rd 1915), aff'd 248 U. S. 55, was a treble damage action against Du Pont, but it did not involve any point of *res judicata.* Upon writ of error one question involved (among some 70 errors assigned) was whether it had been

prejudicial error at the end of a five months' trial for the trial judge to require plaintiff to elect whether it would insist before the jury on a violation of Section 1 or a violation of Section 2 of the Sherman Act. The holding of both the Court of Appeals and of this Court was that the error (if any) was harmless.

The Court of Appeals correctly dealt with the various District Court cases which Petitioner cites, as follows (R. 220):

> "Also not in point, we think, are the cases cited by plaintiff in which the question involved was whether a plaintiff is required to state in separate counts claims based on the Sherman Act and claims based on the Clayton Act. The purpose of the requirement of separate counts is to clarify the issues and simplify the trial, and thus the considerations in determining what are separate 'causes of action' or claims for that purpose are not the same as those when the question is res judicata. As has often been said, the phrase 'cause of action' means different things in different contexts."

II

IT IS EQUALLY WELL SETTLED THAT STATE STATUTES OF LIMITATIONS APPLY TO TREBLE DAMAGE ACTIONS UNDER THE ANTI-TRUST LAWS.

As the second of his "Questions Presented", Petitioner asks whether the rule stated in *Holmberg* v. *Armbrecht*, 327 U. S. 392, should not be enlarged to apply on the law side as well, and if so whether Petitioner should not be relieved from the effects of the prior adjudication.

Holmberg v. *Armbrecht, supra,* held that the statute of limitations of the State of the forum did not control

a suit in a federal court to enforce a federally-created right for which the *sole* remedy was in equity. The Court pointed out that statutes of limitations are not controlling measures of equitable relief but have been drawn upon by equity for the light they may shed in determining whether plaintiff has inexcusably slept on his rights.

In the next following term, the Court reaffirmed that, where there is no federal statute of limitations applicable to a federally-created legal right, State statutes will apply —even though the suit in question is one in equity, under the concurrent jurisdiction, *Cope* v. *Anderson*, 331 U. S. 461. The Court said (p. 463):

> "There is no federal statute of limitations fixing the period within which suits must be brought to enforce the statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154, 158; *Rawlings* v. *Ray*, 312 U. S. 96, 97. Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concurrent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy. *Russell* v. *Todd*, 309 U. S. 280, 289 and cases cited. See also *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395-396."

Where there is no applicable federal statute of limitations, 62 Stat. 944 (1948), 28 U. S. C. A. § 1652 (formerly R. S. § 721, 28 U. S. C. § 725) requires the

application of the statute of the State of the forum in civil actions.

Both before and after *Holmberg* v. *Armbrecht, supra,* it has been many times held that, since no federal statute of limitations has been enacted for anti-trust treble damage actions, the State statutes apply: *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 397; *Williamson* v. *Columbia Gas & Electric Corporation,* 110 F. 2d 15, 16, cert. den. 310 U. S. 639; *Northern Kentucky Telephone Company* v. *Southern Bell T. & T. Co.,* 73 F. 2d 333 (C. C. A. 6th) cert. den. 294 U. S. 719; *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (C. C. A. 9th) cert. den. 336 U. S. 924; *Momand* v. *Universal Film Exchanges, Inc.,* aff'd 172 F. 2d 37, cert. den. 336 U. S. 967.

Of course Petitioner's further assumption under this argument is fantastic, namely, that if this Court *did* now announce a new rule that *no* limitation would bar a suit on a federally-created legal right for which no federal statute of limitation had been enacted, this change would revive a cause of action previously finally adjudicated. *Cf. Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371.

III

THE PETITION SHOULD BE DENIED.

It is obvious that neither of the questions which Petitioner says are presented requires the attention of this Court. They are not novel and they present no conflict with applicable decisions of this Court. On the contrary the decision below applied principles long and well established by this Court.

Respectfully submitted,

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